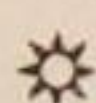


III

THE ORIGIN OF THE IDEA OF NATURAL RIGHT



TO UNDERSTAND the problem of natural right, one must start, not from the "scientific" understanding of political things but from their "natural" understanding, i.e., from the way in which they present themselves in political life, in action, when they are our business, when we have to make decisions. This does not mean that political life necessarily knows of natural right. Natural right had to be discovered, and there was political life prior to that discovery. It means merely that political life in all its forms necessarily points toward natural right as an inevitable problem. Awareness of this problem is not older than political science but coeval with it. Hence a political life that does not know of the idea of natural right is necessarily unaware of the possibility of political science and, indeed, of the possibility of science as such, just as a political life that is aware of the possibility of science necessarily knows natural right as a problem.

The idea of natural right must be unknown as long as the idea of nature is unknown. The discovery of nature is the work of philosophy. Where there is no philosophy, there is no knowledge of natural right as such. The Old Testament, whose basic premise may be said to be the implicit rejection of philosophy, does not know "nature": the Hebrew term for "nature" is unknown to the Hebrew Bible. It goes without saying that "heaven and earth," for example, is not the same thing as "nature." There is, then, no knowledge of natural right as such in the Old Testament. The discovery of nature neces-

sarily precedes the discovery of natural right. Philosophy is older than political philosophy.

Philosophy is the quest for the "principles" of all things, and this means primarily the quest for the "beginnings" of all things or for "the first things." In this, philosophy is at one with myth. But the *philosophos* ("lover of wisdom") is not identical with the *philomythos* ("lover of myth"). Aristotle calls the first philosophers simply "men who discoursed on nature" and distinguishes them from the men who preceded them and "who discoursed on gods."¹ Philosophy as distinguished from myth came into being when nature was discovered, or the first philosopher was the first man who discovered nature. The whole history of philosophy is nothing but the record of the ever repeated attempts to grasp fully what was implied in that crucial discovery which was made by some Greek twenty-six hundred years ago or before. To understand the meaning of that discovery in however provisional a manner, one must return from the idea of nature to its prephilosophic equivalent.

The purport of the discovery of nature cannot be grasped if one understands by nature "the totality of phenomena." For the discovery of nature consists precisely in the splitting-up of that totality into phenomena which are natural and phenomena which are not natural: "nature" is a term of distinction. Prior to the discovery of nature, the characteristic behavior of any thing or any class of things was conceived of as its custom or its way. That is to say, no fundamental distinction was made between customs or ways which are always and everywhere the same and customs or ways which differ from tribe to tribe. Barking and wagging the tail is the way of dogs, menstruation is the way of women, the crazy things done by madmen are the way of madmen, just as not eating pork is the way

1. Aristotle *Metaphysics* 981^b27-29, 982^b18 (cf. *Nicomachean Ethics* 1117^b33-35), 983^b7 ff., 1071^b26-27; Plato *Laws* 891^c, 892^c2-7, 896^a5-^b3.

of Jews and not drinking wine is the way of Moslems. "Custom" or "way" is the prephilosophic equivalent of "nature."

While every thing or every class of things has its custom or way, there is a particular custom or way which is of paramount importance: "our" way, the way of "us" living "here," the way of life of the independent group to which a man belongs. We may call it the "paramount" custom or way. Not all members of the group remain always in that way, but they mostly return to it if they are properly reminded of it: the paramount way is the right path. Its rightness is guaranteed by its oldness: "There is a sort of presumption against novelty, drawn out of a deep consideration of human nature and human affairs; and the maxim of jurisprudence is well laid down, *Vetustas pro lege semper habetur*." But not everything old everywhere is right. "Our" way is the right way because it is both old and "our own" or because it is both "home-bred and prescriptive."² Just as "old and one's own" originally was identical with right or good, so "new and strange" originally stood for bad. The notion connecting "old" and "one's own" is "ancestral." Prephilosophic life is characterized by the primeval identification of the good with the ancestral. Therefore, the right way necessarily implies thoughts about the ancestors and hence about the first things simply.³

For one cannot reasonably identify the good with the ancestral if one does not assume that the ancestors were absolutely superior to "us," and this means that they were superior to

2. Burke, *Letters on a Regicide Peace*, i and iv; cf. Herodotus iii. 38 and i. 8.

3. "The right way" would seem to be the link between "way" (or "custom") in general and "the first things," i.e., between the roots of the two most important meanings of "nature": "nature" as essential character of a thing or a group of things and "nature" as "the first things." For the second meaning see Plato's *Laws* 891^c1-4 and 892^c2-7. For the first meaning, consider Aristotle's as well as the Stoic's reference to "way" in their definitions of nature (Aristotle *Physics* 193^b13-19, 194^a27-30, and 199^a9-10; Cicero *De natura deorum* ii. 57 and 81). When "nature" is denied, "custom" is restored to its original place. Compare Maimonides *Guide of the Perplexed* i. 71 and 73; and Pascal, *Pensées*, ed. Brunschvicg, Frags. 222, 233, 92.

all ordinary mortals; one is driven to believe that the ancestors, or those who established the ancestral way, were gods or sons of gods or at least "dwelling near the gods." The identification of the good with the ancestral leads to the view that the right way was established by gods or sons of gods or pupils of gods: the right way must be a divine law. Seeing that the ancestors are ancestors of a distinct group, one is led to believe that there is a variety of divine laws or codes, each of which is the work of a divine or semidivine being.⁴

Originally, the questions concerning the first things and the right way are answered before they are raised. They are answered by authority. For authority as the right of human beings to be obeyed is essentially derivative from law, and law is originally nothing other than the way of life of the community. The first things and the right way cannot become questionable or the object of a quest, or philosophy cannot emerge, or nature cannot be discovered, if authority as such is not doubted or as long as at least any general statement of any being whatsoever is accepted on trust.⁵ The emergence of the idea of natural right presupposes, therefore, the doubt of authority.

Plato has indicated by the conversational settings of his *Republic* and his *Laws* rather than by explicit statements how indispensable doubt of authority or freedom from authority is for the discovery of natural right. In the *Republic* the discussion of natural right starts long after the aged Cephalus, *the* father, the head of the house, has left to take care of the sacred offerings to the gods: the absence of Cephalus, or of what he stands for, is indispensable for the quest for natural right. Or, if you wish, men like Cephalus do not need to know of natural right. Besides, the discussion makes the participants wholly

4. Plato *Laws* 624^a1-6, 634^e1-2, 662^c7, ^d7-^e7; *Minos* 318^e1-3; Cicero *Laws* ii. 27; cf. Fustel de Coulanges, *La Cité antique*, Part III, chap. xi.

5. Cf. Plato *Charmides* 161^c3-8 and *Phaedrus* 275^e1-3 with *Apology of Socrates* 21^b6-^c2; cf. also Xenophon *Apology of Socrates* 14-15 with *Cyropaedia* vii. 2. 15-17.

oblivious of a torch race in honor of a goddess which they were supposed to watch—the quest for natural right replaces that torch race. The discussion recorded in the *Laws* takes place while the participants, treading in the footsteps of Minos, who, being the son and pupil of Zeus, had brought the Cretans their divine laws, are walking from a Cretan city to the cave of Zeus. Whereas their conversation is recorded in its entirety, nothing is said of whether they arrived at their initial goal. The end of the *Laws* is devoted to the central theme of the *Republic*: natural right, or political philosophy and the culmination of political philosophy, replace the cave of Zeus. If we take Socrates as the representative of the quest for natural right, we may illustrate the relation of that quest to authority as follows: in a community governed by divine laws, it is strictly forbidden to subject these laws to genuine discussion, i.e., to critical examination, in the presence of young men; Socrates, however, discusses natural right—a subject whose discovery presupposes doubt of the ancestral or divine code—not only in the presence of young men but in conversation with them. Some time before Plato, Herodotus had indicated this state of things by the place of the only debate which he recorded concerning the principles of politics: he tells us that that free discussion took place in truth-loving Persia after the slaughter of the Magi.⁶ This is not to deny that, once the idea of natural right has emerged and become a matter of course, it can easily be adjusted to the belief in the existence of divinely revealed law. We merely contend that the predominance of that belief prevents the emergence of the idea of natural right or makes the quest for natural right infinitely unimportant: if man knows by divine revelation what the right path is, he does not have to discover that path by his unassisted efforts.

6. Plato *Laws* 634^d7–635^a5; cf. *Apology of Socrates* 23^c2 ff. with *Republic* 538^c5–^e6; Herodotus iii. 76 (cf. i. 132).

The original form of the doubt of authority and therefore the direction which philosophy originally took or the perspective in which nature was discovered were determined by the original character of authority. The assumption that there is a variety of divine codes leads to difficulties, since the various codes contradict one another. One code absolutely praises actions which another code absolutely condemns. One code demands the sacrifice of one's first-born son, whereas another code forbids all human sacrifices as an abomination. The burial rites of one tribe provoke the horror of another. But what is decisive is the fact that the various codes contradict one another in what they suggest regarding the first things. The view that the gods were born of the earth cannot be reconciled with the view that the earth was made by the gods. Thus the question arises as to which code is the right code and which account of the first things is the true account. The right way is now no longer guaranteed by authority; it becomes a question or the object of a quest. The primeval identification of the good with the ancestral is replaced by the fundamental distinction between the good and the ancestral; the quest for the right way or for the first things is the quest for the good as distinguished from the ancestral.⁷ It will prove to be the quest for what is good by nature as distinguished from what is good merely by convention.

The quest for the first things is guided by two fundamental distinctions which antedate the distinction between the good and the ancestral. Men must always have distinguished (e.g., in judicial matters) between hearsay and seeing with one's own eyes and have preferred what one has seen to what he has merely heard from others. But the use of this distinction was originally limited to particular or subordinate matters. As regards the most weighty matters—the first things and the right

7. Plato *Republic* 538^d3-4 and ^e5-6; *Statesman* 296^c8-9; *Laws* 702^e5-8; Xenophon *Cyropaedia* ii. 2. 26; Aristotle *Politics* 1269^a3-8, 1271^b23-24.

way—the only source of knowledge was hearsay. Confronted with the contradiction between the many sacred codes, someone—a traveler, a man who had seen the cities of many men and recognized the diversity of their thoughts and customs—suggested that one apply the distinction between seeing with one's own eyes and hearsay to all matters, and especially to the most weighty matters. Judgment on, or assent to, the divine or venerable character of any code or account is suspended until the facts upon which the claims are based have been made manifest or demonstrated. They must be made manifest—manifest to all, in broad daylight. Thus man becomes alive to the crucial difference between what his group considers unquestionable and what he himself observes; it is thus that the I is enabled to oppose itself to the We without any sense of guilt. But it is not the I as I that acquires that right. Dreams and visions had been of decisive importance for establishing the claims of the divine code or of the sacred account of the first things. By virtue of the universal application of the distinction between hearsay and seeing with one's own eyes, a distinction is now made between the one true and common world perceived in waking and the many untrue and private worlds of dreams and visions. Thus it appears that neither the We of any particular group nor a unique I, but man as man, is the measure of truth and untruth, of the being or nonbeing of all things. Finally, man thus learns to distinguish between the names of things which he knows through hearsay and which differ from group to group and the things themselves which he, as well as any other human being, can see with his own eyes. He thus can start to replace the arbitrary distinctions of things which differ from group to group by their "natural" distinctions.

The divine codes and the sacred accounts of the first things were said to be known not from hearsay but by way of superhuman information. When it was demanded that the distinc-

thought. The assertion that all visible things have been produced by thinking beings or that there are any superhuman thinking beings requires henceforth a demonstration: a demonstration that starts from what all can see now.⁸

In brief, then, it can be said that the discovery of nature is identical with the actualization of a human possibility which, at least according to its own interpretation, is trans-historical, trans-social, trans-moral, and trans-religious.⁹

The philosophic quest for the first things presupposes not merely that there are first things but that the first things are always and that things which are always or are imperishable are more truly beings than the things which are not always. These presuppositions follow from the fundamental premise that no being emerges without a cause or that it is impossible that "at first Chaos came to be," i.e., that the first things jumped into being out of nothing and through nothing. In other words, the manifest changes would be impossible if there did not exist something permanent or eternal, or the manifest contingent beings require the existence of something necessary and therefore eternal. Beings that are always are of higher dignity than beings that are not always, because only the former can be the ultimate cause of the latter, of the being of the latter, or because what is not always finds its place within the order constituted by what is always. Beings that are not always, are less truly beings than beings that are al-

8. Plato *Laws* 888^c-889^c, 891^c1-9, 892^c2-7, 966^d6-967^e1. Aristotle *Metaphysics* 989^b29-990^a5, 1000^a9-20, 1042^a3 ff.; *De caelo* 298^b13-24. Thomas Aquinas *Summa theologiae* i. qu. 2, a. 3.

9. This view is still immediately intelligible, as can be seen, to a certain extent, from the following remark of A. N. Whitehead: "After Aristotle, ethical and religious interests began to influence metaphysical conclusions. . . . It may be doubted whether any properly general metaphysics can ever, without the illicit introduction of other considerations, get much further than Aristotle" (*Science and the Modern World* [Mentor Books ed.], pp. 173-74). Cf. Thomas Aquinas *Summa theologiae* i. 2. qu. 58, a. 4-5, and qu. 104, a. 1; ii. 2, qu. 19, a. 7, and qu. 45, a. 3 (on the relation of philosophy to morality and religion).

ways, because to be perishable means to be in between being and not-being. One may express the same fundamental premise also by saying that "omnipotence" means power limited by knowledge of "natures,"¹⁰ that is to say, of unchangeable and knowable necessity; all freedom and indeterminacy presuppose a more fundamental necessity.

Once nature is discovered, it becomes impossible to understand equally as customs or ways the characteristic or normal behavior of natural groups and of the different human tribes; the "customs" of natural beings are recognized as their natures, and the "customs" of the different human tribes are recognized as their conventions. The primeval notion of "custom" or "way" is split up into the notions of "nature," on the one hand, and "convention," on the other. The distinction between nature and convention, between *physis* and *nomos*, is therefore coeval with the discovery of nature and hence with philosophy.¹¹

Nature would not have to be discovered if it were not hidden. Hence "nature" is necessarily understood in contradistinction to something else, namely, to that which hides nature in so far as it hides nature. There are scholars who refuse to take "nature" as a term of distinction, because they believe that everything which is, is natural. But they tacitly assume that man knows by nature that there is such a thing as nature or that "nature" is as unproblematic or as obvious as, say, "red." Besides, they are forced to distinguish between natural or existent things and illusory things or things which pretend to exist without existing; but they leave unarticulated the manner of being of the most important things which pretend to exist without existing. The distinction between nature and

10. Consider *Odyssey* x. 303-6.

11. As regards the earliest records of the distinction between nature and convention, see Karl Reinhardt, *Parmenides und die Geschichte der griechischen Philosophie* (Bonn, 1916), pp. 82-88.

convention implies that nature is essentially hidden by authoritative decisions. Man cannot live without having thoughts about the first things, and, it was presumed, he cannot live well without being united with his fellows by identical thoughts about the first things, i.e., without being subject to authoritative decisions concerning the first things: it is the law that claims to make manifest the first things or "what is." The law, in its turn, appeared to be a rule that derives its binding force from the agreement or the convention of the members of the group. The law or the convention has the tendency, or the function, to hide nature; it succeeds to such an extent that nature is, to begin with, experienced or "given" only as "custom." Hence the philosophic quest for the first things is guided by that understanding of "being" or "to be" according to which the most fundamental distinction of manners of being is that between "to be in truth" and "to be by virtue of law or convention"—a distinction that survived in a barely recognizable form in the scholastic distinction between *ens reale* and *ens fictum*.¹²

The emergence of philosophy radically affects man's attitude toward political things in general and toward laws in particular, because it radically affects his understanding of these things. Originally, the authority par excellence or the root of all authority was the ancestral. Through the discovery of nature, the claim of the ancestral is uprooted; philosophy appeals from the ancestral to the good, to that which is good intrinsically, to that which is good by nature. Yet philosophy uproots the claim of the ancestral in such a manner as to preserve an essential element of it. For, when speaking of nature, the first philosophers meant the first things, i.e., the oldest things; philosophy appeals from the ancestral to something

12. Plato *Minos* 315^a1-b2 and 319^c3; *Laws* 889^e3-5, 890^a6-7, 891^e1-2, 904^a9-b1; *Timaeus* 40^d-41^a; cf. also Parmenides, Frag. 6 [Diels]; see P. Bayle, *Pensées diverses*, § 49.

older than the ancestral. Nature is the ancestor of all ancestors or the mother of all mothers. Nature is older than any tradition; hence it is more venerable than any tradition. The view that natural things have a higher dignity than things produced by men is based not on any surreptitious or unconscious borrowings from myth, or on residues of myth, but on the discovery of nature itself. Art presupposes nature, whereas nature does not presuppose art. Man's "creative" abilities, which are more admirable than any of his products, are not themselves produced by man: the genius of Shakespeare was not the work of Shakespeare. Nature supplies not only the materials but also the models for all arts; "the greatest and fairest things" are the work of nature as distinguished from art. By uprooting the authority of the ancestral, philosophy recognizes that nature is *the* authority.¹³

It would be less misleading, however, to say that, by uprooting authority, philosophy recognizes nature as *the* standard. For the human faculty that, with the help of sense-perception, discovers nature is reason or understanding, and the relation of reason or understanding to its objects is fundamentally different from that obedience without reasoning why that corresponds to authority proper. By calling nature the highest authority, one would blur the distinction by which philosophy stands or falls, the distinction between reason and authority. By submitting to authority, philosophy, in particular political philosophy, would lose its character; it would degenerate into ideology, i.e., apologetics for a given or emerging social order, or it would undergo a transformation into theology or legal learning. With regard to the situation in the eighteenth century, Charles Beard has said: "The clergy and the monarchists claimed special rights as divine right. The revolutionists resorted to nature."¹⁴ What is true of the

13. Cicero *Laws* ii. 13 and 40; *De finibus* iv. 72; v. 17.

14. *The Republic* (New York, 1943), p. 38.

eighteenth-century revolutionists is true, *mutatis mutandis*, of all philosophers qua philosophers. The classical philosophers did full justice to the great truth underlying the identification of the good with the ancestral. Yet they could not have laid bare the underlying truth if they had not rejected that identification itself in the first place. Socrates, in particular, was a very conservative man as far as the ultimate practical conclusions of his political philosophy were concerned. Yet Aristophanes pointed to the truth by suggesting that Socrates' fundamental premise could induce a son to beat up his own father, i.e., to repudiate in practice the most natural authority.

The discovery of nature or of the fundamental distinction between nature and convention is the necessary condition for the emergence of the idea of natural right. But it is not its sufficient condition: all right might be conventional. This precisely is the theme of the basic controversy in political philosophy: Is there any natural right? It seems that the answer which prevailed prior to Socrates was the negative one, i.e., the view which we have called "conventionalism."¹⁵ It is not surprising that philosophers should first have inclined toward conventionalism. Right presents itself, to begin with, as identical with law or custom or as a character of it; and custom or convention comes to sight, with the emergence of philosophy, as that which hides nature.

The crucial pre-Socratic text is a saying of Heraclitus: "In God's view, all things are fair [noble] and good and just, but men have made the supposition that some things are just and others are unjust." The very distinction between just and unjust is merely a human supposition or a human convention.¹⁶ God, or whatever one may call the first cause, is beyond good

15. Cf. Plato *Laws* 889^d7-890^a2 with 891^c1-5 and 967^a7 ff.; Aristotle *Metaphysics* 990^a3-5 and *De caelo* 298^b13-24; Thomas Aquinas, *Summa theologiae* i. qu. 44, a. 2.

16. Frag. 102; cf. Frags. 58, 67, 80.

and evil and even beyond good and bad. God is not concerned with justice in any sense that is relevant to human life as such: God does not reward justice and punish injustice. Justice has no superhuman support. That justice is good and injustice is bad is due exclusively to human agencies and ultimately to human decisions. "No traces of divine justice are found except where just men reign; otherwise there is one event, as we see, to the righteous and to the wicked." The denial of natural right thus appears to be the consequence of the denial of particular providence.¹⁷ But the example of Aristotle alone would suffice to show that it is possible to admit natural right without believing in particular providence or in divine justice proper.¹⁸

For, however indifferent to moral distinctions the cosmic order may be thought to be, human nature, as distinguished from nature in general, may very well be the basis of such distinctions. To illustrate the point by the example of the best-known pre-Socratic doctrine, namely, of atomism, the fact that the atoms are beyond good and bad does not justify the inference that there is nothing by nature good or bad for any compounds of atoms, and especially for those compounds which we call "men." In fact, no one can say that all distinctions between good and bad which men make or all human preferences are merely conventional. We must therefore distinguish between those human desires and inclinations which

17. Spinoza, *Tractatus theologico-politicus*, chap. xix (§ 20, Bruder ed.). Victor Cathrein (*Recht, Naturrecht und positives Recht* [Freiburg im Breisgau, 1901], p. 139) says: "... lehnt man das Dasein eines persönlichen Schöpfers und Weltregierers ab, so ist das Naturrecht nicht mehr festzuhalten."

18. *Nicomachean Ethics* 1178^b7-22; F. Socinus, *Praelectiones theologicae*, cap. 2; Grotius, *De jure belli ac pacis*, Prolegomena § 11; Leibniz, *Nouveaux essais*, Book I, chap. ii; § 2. Consider the following passages from Rousseau's *Contrat social*: "On voit encore que les parties contractantes seraient entre elles sous la seule loi de nature et sans aucun garant de leurs engagements réciproques . . ." (III, chap. 16) and "À considérer humainement les choses, faute de sanction naturelle, les lois de la justice sont vaines parmi les hommes" (II, chap. 6).

are natural and those which originate in conventions. Furthermore, we must distinguish between those human desires and inclinations which are in accordance with human nature and therefore good for man, and those which are destructive of his nature or his humanity and therefore bad. We are thus led to the notion of a life, a human life, that is good because it is in accordance with nature.¹⁹ Both parties to the controversy admit that there is such a life, or, more generally expressed, they admit the primacy of the good as distinguished from the just.²⁰ The controversial issue is whether the just is good (by nature good) or whether the life in accordance with human nature requires justice or morality.

In order to arrive at a clear distinction between the natural and the conventional, we have to go back to the period in the life of the individual²¹ or of the race which antedates convention. We have to go back to the origins. With a view to the connection between right and civil society, the question of the origin of right transforms itself into the question of the origin of civil society or of society in general. This question leads to the question of the origin of the human race. It further leads to the question of what man's original condition was like: whether it was perfect or imperfect and, if it was imperfect, whether the imperfection had the character of gentleness (good-naturedness or innocence) or of savagery.

If we examine the record of the age-old discussion of these questions, we can easily receive the impression that almost

19. This notion was accepted by "almost all" classical philosophers, as Cicero emphasizes (*De finibus* v. 17). It was rejected, above all, by the Skeptics (see Sextus Empiricus *Pyrrhonica* iii. 235).

20. Plato *Republic* 493^c1-5, 504^d4-505^a4; *Symposium* 206^e2-207^a2; *Theaetetus* 177^c6-d⁷; Aristotle *Nicomachean Ethics* 1094^a1-3 and ^b14-18.

21. As regards reflections on how man is "immediately from the moment of his birth," see, e.g., Aristotle *Politics* 1254^a23 and *Nicomachean Ethics* 1144^b4-6; Cicero *De finibus* ii. 31-32; iii. 16; v. 17, 43, and 55; Diogenes Laertius x. 137; Grotius, *op. cit.*, Prolegomena § 7; Hobbes, *De cive*, i, 2, annot. 1.

any answer to the questions regarding the origins is compatible with the acceptance or the rejection of natural right.²² These difficulties have contributed to the depreciation, not to say the complete disregard, of the questions concerning the origin of civil society and of the condition of "the first men." What is important, we have been told, is "the idea of the state" and in no way "the historical origin of the state."²³ This modern view is a consequence of the rejection of nature as the standard. Nature and Freedom, Reality and Norm, the Is and the Ought, appeared to be wholly independent of one another; hence it seemed that we cannot learn anything important about civil society and about right by studying the origins. From the point of view of the ancients, however, the question of the origins is of decisive importance because the correct answer to it clarifies the status, the dignity, of civil society and of right. One inquires into the origins or the genesis of civil society, or of right and wrong, in order to find out whether civil society and right or wrong are based on nature or merely on convention.²⁴ And the question of the "essential" origin of civil society and of right or wrong cannot be answered without consideration of what is known about the beginnings or the "historical" origins.

As for the question of whether man's actual condition in the beginning was perfect or imperfect, the answer to it decides whether the human race is fully responsible for its actual imperfection or whether that imperfection is "excused" by the original imperfection of the race. In other words, the view

22. As for the combination of the assumption of savage beginnings with the acceptance of natural right, cf. Cicero *Pro Sestio* 91-92 with *Tusc. Disp.* v. 5-6, *Republic* i. 2, and *Offices* ii. 15. See also Polybius vi. 4. 7, 5. 7-6. 7, 7. 1. Consider the implication of Plato *Laws* 680^d4-7 and of Aristotle *Politics* 1253^a35-38.

23. Hegel, *Philosophy of Right*, § 258; cf. Kant, *Metaphysik der Sitten*, ed. Vorlaender, pp. 142 and 206-7.

24. Cf. Aristotle *Politics* 1252^a18 ff. and 24 ff. with 1257^a4 ff. Consider Plato *Republic* 369^b5-7, *Laws* 676^a1-3; also Cicero *Republic* i. 39-41.

that man's beginning was perfect is in accordance with the equation of the good with the ancestral, as well as with theology rather than philosophy. For man remembered and admitted at all times that the arts were invented by man or that the first age of the world did not know the arts; but philosophy necessarily presupposes the arts; therefore, if the philosophic life is indeed the right life or the life according to nature, man's beginnings were necessarily imperfect.²⁵

For our present purpose it is sufficient to give an analysis of the standard argument used by conventionalism. That argument is to the effect that there cannot be natural right because "the just things" differ from society to society. This argument has shown an amazing vitality throughout the ages, a vitality which seems to contrast with its intrinsic worth. As usually presented, the argument consists of a simple enumeration of the different notions of justice that prevail or prevailed in different nations or at different times within the same nation. As we have indicated before, the mere fact of variety or mutability of "the just things" or of the notions of justice does not warrant the rejection of natural right except if one makes certain assumptions, and these assumptions are in most cases not even stated. We are therefore compelled to reconstruct the conventionalist argument out of scattered and fragmentary remarks.

It is granted on all sides that there cannot be natural right if the principles of right are not unchangeable.²⁶ But the facts to which conventionalism refers do not seem to prove that the principles of right are changeable. They merely seem to prove that different societies have different notions of justice or of the principles of justice. As little as man's varying notions of

25. Plato *Laws* 677^b5-678^b3, 679^c; Aristotle *Metaphysics* 981^b13-25.

26. Aristotle *Nicomachean Ethics* 1094^b14-16 and 1134^b18-27; Cicero *Republic* iii. 13-18 and 20; Sextus Empiricus *Pyrrhonica* iii. 218 and 222. Cf. Plato *Laws* 889^e6-8 and Xenophon *Memorabilia* iv. 4. 19.

the universe prove that there is no universe or that there cannot be *the* true account of the universe or that man can never arrive at true and final knowledge of the universe, so little seem man's varying notions of justice to prove that there is no natural right or that natural right is unknowable. The variety of notions of justice can be understood as the variety of errors, which variety does not contradict, but presupposes, the existence of the one truth regarding justice. This objection to conventionalism would hold if the existence of natural right were compatible with the fact that all men or most men were or are ignorant of natural right. But when speaking of natural right, one implies that justice is of vital importance to man or that man cannot live or live well without justice; and life in accordance with justice requires knowledge of the principles of justice. If man has such a nature that he cannot live, or live well, without justice, he must have by nature knowledge of the principles of justice. But if this were the case, all men would agree as regards the principles of justice, just as they agree as regards the sensible qualities.²⁷

Yet this demand seems to be unreasonable; there is not even universal agreement as regards the sensible qualities. Not all men, but only all normal men, agree as regards sounds, colors, and the like. Accordingly, the existence of natural right requires merely that all normal men should agree as regards the principles of justice. The lack of universal agreement can be explained by a corruption of human nature in those who ignore the true principles, a corruption which, for obvious reasons, is more frequent and more effective than the corresponding corruption in regard to the perception of sensible qualities.²⁸ But if it is true that the notions of justice differ from society to society or from age to age, this view of natural right will lead to the hard consequence that the members of one par-

27. Cicero *Republic* iii. 13 and *Laws* i. 47; Plato *Laws* 889^e.

28. Cicero *Laws* i. 33 and 47.

particular society or perhaps even only one generation in one particular society or, at the most, the members of some particular societies must be regarded as the only normal human beings in existence. For all practical purposes, this means that the natural right teacher will identify natural right with those notions of justice that are cherished by his own society or by his own "civilization." By speaking of natural right, he will do nothing else than claim universal validity for the prejudices of his group. If it is asserted that, as a matter of fact, many societies agree in regard to the principles of justice, it is at least as plausible to rejoin that this agreement is due to accidental causes (such as similarity of conditions of life or mutual influence) than to say that these particular societies alone have preserved human nature intact. If it is asserted that all civilized nations agree in regard to the principles of justice, one would first have to know what is meant by "civilization." If the natural right teacher identifies civilization with recognition of natural right or an equivalent, he says, in effect, that all men who accept the principles of natural right accept the principles of natural right. If he understands by "civilization" a high development of the arts or sciences, his contention is refuted by the fact that conventionalists are frequently civilized men; and believers in natural right or in the principles which are said to constitute the essence of natural right are frequently very little civilized.²⁹

This argument against natural right presupposes that all knowledge which men need in order to live well is natural in the sense in which the perception of sensible qualities and other kinds of effortless perception are natural. It loses its force, therefore, once one assumes that knowledge of natural right must be acquired by human effort or that knowledge of natural right has the character of science. This would explain why knowledge of natural right is not always available. It

29. Cf. Locke, *An Essay Concerning Human Understanding*, Book I, chap. iii, sec. 20.

would lead to the consequence that there is no possibility of a good or just life or no possibility of "the cessation of evil" before such knowledge has become available. But science has as its object what is always or what is unchangeable or what is truly. Therefore, natural right, or justice, must truly exist, and therefore it must "have everywhere the same power."³⁰ Thus it seems that it must have an effect that is always the same and that never ceases at least on human thought on justice. Yet, in fact, we see that human thoughts on justice are in a state of disagreement and fluctuation.

But this very fluctuation and disagreement would seem to prove the effectiveness of natural right. As regards such things as are unquestionably conventional—weights, measures, money, and the like—one can hardly speak of disagreement between the various societies. Different societies make different arrangements in regard to weights, measures, and money; these arrangements do not contradict one another. But if different societies hold different views regarding the principles of justice, their views contradict one another. Differences regarding things which are unquestionably conventional do not arouse serious perplexities, whereas differences regarding the principles of right and wrong necessarily do. The disagreement regarding the principles of justice thus seems to reveal a genuine perplexity aroused by a divination or insufficient grasp of natural right—a perplexity caused by something self-subsistent or natural that eludes human grasp. This suspicion could be thought to be confirmed by a fact which, at first glance, seems to speak decisively in favor of conventionalism. Everywhere it is said that it is just to do what the law commands or that the just is identical with the legal, i.e., with what human beings establish as legal or agree to regard as legal. Yet does this not imply that there is a measure of universal agreement in regard to justice? It is true that, on reflec-

30. Aristotle *Nicomachean Ethics* 1134^b19.

tion, people deny that the just is simply identical with the legal, for they speak of "unjust" laws. But does not the unreflective universal agreement point to the workings of nature? And does not the untenable character of the universal belief in the identity of the just with the legal indicate that the legal, while not being identical with the just, reflects natural right more or less dimly? The evidence adduced by conventionalism is perfectly compatible with the possibility that natural right exists and, as it were, solicits the indefinite variety of notions of justice or the indefinite variety of laws, or is at the bottom of all laws.³¹

The decision depends now on the result of the analysis of law. Law reveals itself as something self-contradictory. On the one hand, it claims to be something essentially good or noble: it is the law that saves the cities and everything else. On the other hand, the law presents itself as the common opinion or decision of the city, i.e., of the multitude of citizens. As such, it is by no means essentially good or noble. It may very well be the work of folly and baseness. There is certainly no reason to assume that the makers of laws are as a rule wiser than "you and I"; why, then, should "you and I" submit to their decision? The mere fact that the same laws which were solemnly enacted by the city are repealed by the same city with equal solemnity would seem to show the doubtful character of the wisdom that went into their making.³² The question, then, is whether the claim of the law to be something good or noble can be simply dismissed as altogether unfounded or whether it contains an element of truth.

The law claims that it saves the cities and everything else. It claims to secure the common good. But the common good is

31. Plato *Republic* 340^a7-8 and 338^d10-e²; Xenophon *Memorabilia* iv. 6. 6; Aristotle *Nicomachean Ethics* 1129^b12; Heraclitus, Frag. 114.

32. Plato *Hippias maior* 284^{d-e}; *Laws* 644^d2-3 and 780^d4-5; *Minos* 314^c1-e⁵; Xenophon *Memorabilia* i. 2. 42 and iv. 4. 14; Aeschylus *Seven* 1071-72; Aristophanes *Clouds* 1421-22.

exactly what we mean by "the just." Laws are just to the extent that they are conducive to the common good. But if the just is identical with the common good, the just or right cannot be conventional: the conventions of a city cannot make good for the city what is, in fact, fatal for it and vice versa. The nature of things and not convention then determines in each case what is just. This implies that what is just may very well differ from city to city and from period to period: the variety of just things is not only compatible with, but a consequence of, the principle of justice, namely, that the just is identical with the common good. Knowledge of what is just here and now, which is knowledge of what is by nature, or intrinsically, good for this city now, cannot be scientific knowledge. Still less can it be knowledge of the type of sense-perception. To establish what is just in each case is the function of the political art or skill. That art or skill is comparable to the art of the physician, who establishes what is in each case healthy or good for the human body.³³

Conventionalism avoids this consequence by denying that there is in truth a common good. What is called the "common good" is, in fact, in each case the good, not of the whole, but of a part. The laws which claim to be directed toward the common good claim indeed to be the decision of the city. But the city owes such unity as it possesses, and therewith its being, to its "constitution" or to its regime: the city is always either a democracy or an oligarchy or a monarchy and so on. The difference of regimes has its root in the difference of the parts or sections out of which the city is composed. Therefore, every regime is the rule of a section of the city. Hence the laws are, in fact, the work not of the city but of that section of the city which happens to be in control. It is needless to say that democracy, which claims to be the rule of all, is, in fact, the

33. Cf. Aristotle *Nicomachean Ethics* 1129^b17-19 and *Politics* 1282^b15-17 with Plato *Theaetetus* 167^c2-8, 172^a1-b6, and 177^c6-178^b1.

rule of a part; for democracy is at the most the rule of the majority of all adults who inhabit the territory of the city; but the majority are the poor; and the poor are a section, however numerous, which has an interest distinct from the interests of the other sections. The ruling section is, of course, concerned exclusively with its own interest. But it pretends for an obvious reason that the laws which it lays down with a view to its own interest are good for the city as a whole.³⁴

Yet may there not be mixed regimes, i.e., regimes which more or less successfully try to establish a fair balance between the conflicting interests of the essential sections of the city? Or is it not possible that the true interest of one particular section (of the poor or of the gentlemen, for example) coincides with the common interest? Objections of this kind presuppose that the city is a genuine whole or, more precisely, that the city exists by nature. But the city would seem to be a conventional or fictitious unity. For what is natural comes into being and exists without violence. All violence applied to a being makes that being do something which goes against its grain, i.e., against its nature. But the city stands or falls by violence, compulsion, or coercion. There is, then, no essential difference between political rule and the rule of a master over his slaves. But the unnatural character of slavery seems to be obvious: it goes against any man's grain to be made a slave or to be treated as a slave.³⁵

Furthermore, the city is a multitude of citizens. A citizen appears to be the offspring, the natural product, of born citizens, of a citizen father and a citizen mother. Yet he is a citizen only if the citizen father and the citizen mother who generated

34. Plato *Laws* 889^d4–890^a2 and 714^b3–^d10; *Republic* 338^d7–339^a4 and 340^a7–8; Cicero *Republic* iii. 23.

35. Aristotle *Politics* 1252^a7–17, 1253^b20–23, 1255^a8–11 (cf. *Nicomachean Ethics* 1096^a5–6, 1109^b35–1110^a4, 1110^b15–17, 1179^b28–29, 1180^a4–5, 18–21; *Metaphysics* 1015^a26–33). Plato *Protagoras* 337^e7–^d3; *Laws* 642^e6–^d1; Cicero *Republic* iii. 23; *De finibus* v. 56; Fortescue, *De laudibus legum Angliae* chap. xlii (ed. Chrimes, p. 104).

him are lawfully wedded to each other, or rather if his presumed father is the husband of his mother. Otherwise, he is only a "natural" child and not a "legitimate" child. And what a legitimate child is depends not on nature but on law or convention. For the family in general, and the monogamous family in particular, is not a natural group, as even Plato was forced to admit. There is also the fact called "naturalization," by virtue of which a "natural" foreigner is artificially transformed into a "natural" citizen. In a word, who is or who is not a citizen depends on the law, and on the law alone. The difference between citizens and noncitizens is not natural but conventional. Therefore, all citizens are, in fact, "made" and not "born." It is convention that arbitrarily cuts off one segment of the human race and sets it off against the rest. One might think for a moment that the civil society which is truly natural, or the genuine civil society, would coincide with the group that embraces all those, and only those, who speak the same language. But languages are admittedly conventional. Accordingly, the distinction between Greeks and barbarians is merely conventional. It is as arbitrary as the division of all numbers into two groups, one consisting of the number 10,000 and the other consisting of all other numbers. The same applies to the distinction between free men and slaves. This distinction is based on the convention that people taken prisoner in war and not ransomed are to be made slaves; not nature but convention makes slaves, and therewith freemen as distinguished from slaves. To conclude, the city is a multitude of human beings who are united not by nature but solely by convention. They have united or banded together in order to take care of their common interest—over against other human beings who are not by nature distinguished from them: over against foreigners and slaves. Hence what claims to be the common good is, in fact, the interest of a part which claims to be a whole, or a part which forms a unity only by virtue of

this claim, this pretense, this convention. If the city is conventional, the common good is conventional, and therewith it is proved that right or justice is conventional.³⁶

How adequate this account of justice is, is said to appear from the fact that it "saves the phenomena" of justice; it is said to make intelligible those simple experiences regarding right and wrong which are at the bottom of the natural right doctrines. In those experiences, justice is understood as the habit of refraining from hurting others or as the habit of helping others or as the habit of subordinating the good of a part (the good of the individual or of a section) to the good of the whole. Justice thus understood is indeed necessary for the preservation of the city. But it is unfortunate for the defenders of justice that it is also required for the preservation of a gang of robbers: the gang could not last a single day if its members did not refrain from hurting one another, if they did not help one another, or if each member did not subordinate his own good to the good of the gang. To this the objection is made that the justice practiced by robbers is not genuine justice or that it is precisely justice which distinguishes the city from a gang of robbers. The so-called "justice" of robbers is in the service of manifest injustice. But is not exactly the same true of the city? If the city is not a genuine whole, what is called the "good of the whole," or the just, in opposition to the unjust or selfish, is, in fact, merely the demand of collective selfishness; and there is no reason why collective selfishness should claim to be more respectable than the selfishness of the individual. In other words, the robbers are said to practice justice only among themselves, whereas the city is said to practice justice also toward those who do not belong to the city or

36. Antiphon, in Diels, *Vorsokratiker* (5th ed.), B44 (A7, B2). Plato *Protagoras* 337^c7-d³; *Republic* 456^b12-c³ (and context); *Statesman* 262^c10-e⁵; Xenophon *Hiero* 4. 3-4; Aristotle *Politics* 1275^a1-2, ^b21-31, 1278^a30-35; Cicero *Republic* iii. 16-17 and *Laws* ii. 5. Consider the implication of the comparison of civil societies to "herds" (see Xenophon *Cyropaedia* i. 1. 2; cf. Plato *Minos* 318^a1-3).

toward other cities. But is this true? Are the maxims of foreign policy essentially different from the maxims on which gangs of robbers act? Can they be different? Are cities not compelled to use force and fraud or to take away from other cities what belong to the latter, if they are to prosper? Do they not come into being by usurping a part of the earth's surface which by nature belongs equally to all others?³⁷

It is, of course, possible for the city to refrain from hurting other cities or to be resigned to poverty, just as the individual can live justly if he wants to. But the question is whether in acting thus men would live according to nature or merely follow convention. Experience shows that only few individuals and hardly any cities act justly except when they are compelled to do so. Experience shows that justice by itself is ineffectual. This merely confirms what was shown before, that justice has no basis in nature. The common good proved to be the selfish interest of a collective. The selfish interest of the collective is derived from the selfish interest of the only natural elements of the collective, namely, of the individuals. By nature everyone seeks his own good and nothing but his own good. Justice, however, tells us to seek other men's good. What justice demands from us is then against nature. The natural good, the good which does not depend on the whims and follies of man, this substantial good appears to be the very opposite of that shadowy good called "right" or "justice." It is the natural good which is one's own good toward which everyone is drawn by nature, whereas right or justice becomes attractive only through compulsion and ultimately through convention. Even those who assert that right is natural have to admit that justice consists in a kind of reciprocity; men are bidden to do to others what they desire to have done to themselves. Men are compelled to benefit others because they desire

37. Plato *Republic* 335^d11-12 and 351^e7-^d13; Xenophon *Memorabilia* iv. 4. 12 and 8. 11; Aristotle *Nicomachean Ethics* 1129^b11-19, 1130^a3-5 and 1134^b2-6; Cicero *Offices* i. 28-29; *Republic* iii. 11-31.

to be benefited by others: in order to receive kindness, one must show kindness. Justice appears to be derivative from selfishness and subservient to it. This amounts to an admission that by nature everyone seeks only his own good. To be good at seeking one's own good is prudence or wisdom. Prudence or wisdom is therefore incompatible with justice proper. The man who is truly just is unwise or a fool—a man duped by convention.³⁸

Conventionalism claims, then, to be perfectly compatible with the admission that the city and right are useful for the individual: the individual is too weak to live, or to live well, without the assistance of others. Everyone is better off in civil society than in a condition of solitude and savagery. Yet the fact that something is useful does not prove that it is natural. Crutches are useful for a man who has lost a leg; is wearing crutches according to nature? Or, to express this more adequately, can things that exist exclusively because calculation has found out that they would be useful be said to be natural to man? Can one say of things which are desired exclusively on the basis of calculation or which are not desired spontaneously or for their own sake that they are natural to man? The city and right are no doubt advantageous; but are they free from great disadvantages? Therefore, the conflict between the self-interest of the individual and the demands of the city or of right is inevitable. The city cannot settle this conflict except by declaring that the city or right is of higher dignity than the self-interest of the individual or that it is sacred. But this claim, which is of the essence of the city and of right, is essentially fictitious.³⁹

The nerve of the conventionalist argument, then, is this:

38. Thrasy Machus, in Diels, *Vorsokratiker* (5th ed.), B8; Plato *Republic* 343^c3, 6-7, ^d2, 348^c11-12, 360^d5; *Protagoras* 333^d4-e1; Xenophon *Memorabilia* ii. 2. 11-12; Aristotle *Nicomachean Ethics* 1130^a3-5, 1132^b33-1133^a5, 1134^b5-6; Cicero *Republic* iii. 16, 20, 21, 23, 24, 29-30.

39. Plato *Protagoras* 322^b6, 327^c4-e1; Cicero *Republic* i. 39-40, iii. 23, 26; *De finibus* ii. 59; cf. also Rousseau, *Discours sur l'origine de l'inégalité* (Flammarion ed.), p. 173.

right is conventional because right belongs essentially to the city⁴⁰ and the city is conventional. Contrary to our first impression, conventionalism does not assert that the meaning of right or justice is altogether arbitrary or that there is no universal agreement of any kind in regard to right or justice. On the contrary, conventionalism presupposes that all men understand by justice fundamentally the same thing: to be just means not to hurt others, or it means to help others or to be concerned with the common good. Conventionalism rejects natural right on these grounds: (1) justice stands in an inescapable tension with everyone's natural desire, which is directed solely toward his own good; (2) as far as justice has a foundation in nature—as far as it is, generally speaking, advantageous to the individual—its demands are limited to the members of the city, i.e., of a conventional unit; what is called "natural right" consists of certain rough rules of social expediency which are valid only for the members of the particular group and which, in addition, lack universal validity even in intra-group relations; (3) what is universally meant by "right" or "justice" leaves wholly undetermined the precise meaning of "helping" or "hurting" or "the common good"; it is only through specification that these terms become truly meaningful, and every specification is conventional. The variety of notions of justice confirms rather than proves the conventional character of justice.

When Plato attempts to establish the existence of natural right, he reduces the conventionalist thesis to the premise that the good is identical with the pleasant. Conversely, we see that classical hedonism led to the most uncompromising depreciation of the whole political sphere. It would not be surprising if the primeval equation of the good with the ancestral had been replaced, first of all, by the equation of the good with the pleasant. For when the primeval equation is

40. Aristotle *Politics* 1253^a37-38.

rejected on the basis of the distinction between nature and convention, the things forbidden by ancestral custom or the divine law present themselves as emphatically natural and hence intrinsically good. The things forbidden by ancestral custom are forbidden because they are desired; and the fact that they are forbidden by convention shows that they are not desired on the basis of convention; they are then desired by nature. Now what induces man to deviate from the narrow path of ancestral custom or divine law appears to be the desire for pleasure and the aversion to pain. The natural good thus appears to be pleasure. Orientation by pleasure becomes the first substitute for the orientation by the ancestral.⁴¹

The most developed form of classical hedonism is Epicureanism. Epicureanism is certainly that form of conventionalism which has exercised the greatest influence throughout the ages. Epicureanism is unambiguously materialistic. And it was in materialism that Plato found the root of conventionalism.⁴² The Epicurean argument runs as follows: To find what is by nature good, we have to see what kind of thing it is whose goodness is guaranteed by nature or whose goodness is felt independently of any opinion, and hence, in particular, independently of any convention. What is good by nature shows itself in what we seek from the moment of birth, prior to all reasoning, calculation, discipline, restraint, or compulsion. Good, in this sense, is only the pleasant. Pleasure is the only good that is immediately felt or sensibly perceived as good. Therefore, the primary pleasure is the pleasure of the body, and this means, of course, the pleasure of one's own body; everyone seeks by nature only his own good; all concern with other people's good is derivative. Opinion, which comprises

41. Antiphon, in Diels, *Vorsokratiker* (5th ed.), B44, A5; Thucydides v. 105; Plato *Republic* 364^a2-4 and 538^c6-539^a4; *Laws* 662^d, 875^b1-c3, 886^a8-b2, 888^a3; *Protagoras* 352^d6 ff.; *Clitophon* 407^d4-6; *Eighth Letter* 354^e5-355^a1 (cf. also *Gorgias* 495^d1-5); Xenophon *Memorabilia* ii. 1; Cicero *Laws* i. 36 and 38-39.

42. *Laws* 889^b-890^a.

both right and wrong reasoning, leads men toward three kinds of objects of choice: toward the greatest pleasure, toward the useful, and toward the noble. As for the first, since we observe that various kinds of pleasure are connected with pain, we are induced to distinguish between more or less preferable pleasures. Thus we notice the difference between those natural pleasures which are necessary and those which are not necessary. Furthermore, we realize that there are pleasures which are free of any admixture of pain, and others which are not. Finally, we are led to see that there is a term of pleasure, a complete pleasure, and this pleasure proves to be the end toward which we are tending by nature and to be accessible only through philosophy. As for the useful, it is not in itself pleasant, but is conducive to pleasure, to genuine pleasure. The noble, on the other hand, is neither genuinely pleasant nor conducive to genuine pleasure. The noble is that which is praised, which is pleasant only because it is praised or because it is regarded as honorable; the noble is good only because people call it good or say that it is good; it is good only by convention. The noble reflects in a distorted manner the substantial good for the sake of which men made the fundamental convention or the social compact. Virtue belongs to the class of the useful things. Virtue is, indeed, desirable, but it is not desirable for its own sake. It becomes desirable only on the basis of calculation, and it contains an element of compulsion and therefore of pain. It is, however, productive of pleasure.⁴³ Yet there is a crucial difference between justice and the other virtues. Prudence, temperance, and courage bring about pleasure through their

43. Epicurus *Ratae sententiae* 7; Diogenes Laertius x 137; Cicero *De finibus* i. 30, 32, 33, 35, 37, 38, 42, 45, 54, 55, 61, 63; ii. 48, 49, 107, 115; iii. 3; iv. 51; *Offices* iii. 116-17; *Tusc. Disp.* v. 73; *Acad. Pr.* ii. 140; *Republic* iii. 26. Cf. the formulation of the Epicurean principle by Philip Melanchthon (*Philosophiae moralis epitome*, Part I: *Corpus Reformatorum*, Vol. XVI, col. 32): "Illa actio est finis, ad quam natura ultro fertur, et non coacta. Ad voluptatem ultro rapiuntur homines maximo impetu, ad virtutem vix cogi possunt. Ergo voluptas est finis hominis, non virtus." Cf. also Hobbes, *De cive*, i, 2.

natural consequences, whereas justice produces the pleasure which is expected from it—a sense of security—only on the basis of convention. The other virtues have a salutary effect regardless of whether or not other people know of one's being prudent, temperate, or courageous. But one's justice has a salutary effect only if one is thought to be just. The other vices are evils independently of whether they are detected or detectable by others or not. But injustice is an evil only with a view to the hardly avoidable danger of detection. The tension between justice and what is by nature good comes out most clearly if one compares justice with friendship. Both justice and friendship originate in calculation, but friendship comes to be intrinsically pleasant or desirable for its own sake. Friendship is at any rate incompatible with compulsion. But justice and the association that is concerned with justice—the city—stand or fall by compulsion. And compulsion is unpleasant.⁴⁴

The greatest document of philosophic conventionalism and, in fact, its only document available to us that is both authentic

44. Epicurus *Ratae sententiae* 34; *Gnomologium Vaticanum* 23; Cicero *De finibus* i. 51 (cf. 41), 65–70; ii. 28 and 82; *Offices* iii. 118. In *Ratae sententiae* 31, Epicurus says: "The right [or the just] of nature is a *symbolon* of the advantage deriving from men's not harming each other and not being harmed." As is shown by *Ratae sententiae* 32 ff., this cannot mean that there is a natural right in the strict sense, i.e., a right independent of, or prior to, all covenants or compacts: the *symbolon* is identical with a compact of some kind. What Epicurus suggests is that, in spite of the infinite variety of just things, justice or right is everywhere designed primarily to fulfil one and the same function: right understood in the light of its universal or primary function is, in a sense, "the right of nature." It is opposed to the fabulous or superstitious accounts of justice which are generally accepted in the cities. "The right of nature" is that principle of right which is admitted by the conventionalist doctrine. "The right of nature" thus becomes equivalent to "the nature of right" (*Ratae sententiae* 37) as opposed to the false opinions about right. The expression "the nature of right" is used by Glaucon in his summary of the conventionalist doctrine in the *Republic* (359^b4–5): the nature of right consists in a certain convention that is against nature. Gassendi, the famous restorer of Epicureanism, had stronger incentives than the ancient Epicureans for asserting the existence of natural right. In addition, Hobbes had taught him how Epicureanism could be combined with the assertion of natural right. Yet Gassendi did not avail himself of this novel opportunity. See his paraphrase of *Ratae sententiae* 31 (*Animadversiones* [Lyon, 1649], pp. 1748–49).

and comprehensive is the poem *On the Nature of Things* by the Epicurean Lucretius. According to Lucretius, men roamed originally in forests, without social bonds of any kind or without any conventional restraint. Their weakness and their fear of the dangers threatening them from wild beasts induced them to unite for the sake of protection or for the sake of the pleasure deriving from security. After they entered society, the savage life of the beginning gave way to habits of kindness and fidelity. This early society, the society antedating by far the foundation of cities, was the best and most happy society that ever was. Right would be natural if the life of the early society were the life according to nature. But the life according to nature is the life of the philosopher. And philosophy is impossible in early society. Philosophy has its home in cities, and the destruction, or at least the impairment, of the way of life characteristic of early society is characteristic of the life in cities. The happiness of the philosopher, the only true happiness, belongs to an entirely different epoch than the happiness of society. There is, then, a disproportion between the requirements of philosophy or of the life according to nature and the requirements of society as society. It is owing to this necessary disproportion that right cannot be natural. The disproportion is necessary for the following reason. The happiness of early, noncoercive society was ultimately due to the reign of a salutary delusion. The members of early society lived within a finite world or a closed horizon; they trusted in the eternity of the visible universe or in the protection afforded to them by "the walls of the world." It was this trust which made them innocent, kind, and willing to devote themselves to the good of others; for it is fear which makes men savage. The trust in the firmness of "the walls of the world" was not yet shaken by reasoning about natural catastrophes. Once this trust was shaken, men lost their innocence, they became savage; and thus the need for coercive society arose. Once this

trust was shaken, men had no choice but to seek support and consolation in the belief in active gods; the free will of the gods should guarantee the firmness of "the walls of the world" which had been seen to lack intrinsic or natural firmness; the goodness of the gods should be a substitute for the lack of intrinsic firmness of "the walls of the world." The belief in active gods then grows out of fear for our world and attachment to our world—the world of sun and moon and stars, and the earth covering itself with fresh green every spring, the world of life as distinguished from the lifeless but eternal elements (the atoms and the void) out of which our world has come into being and into which it will perish again. Yet, however comforting the belief in active gods may be, it has engendered unspeakable evils. The only remedy lies in breaking through "the walls of the world" at which religion stops and in becoming reconciled to the fact that we live in every respect in an unwalled city, in an infinite universe in which nothing that man can love can be eternal. The only remedy lies in philosophizing, which alone affords the most solid pleasure. Yet philosophy is repulsive to the people because philosophy requires freedom from attachment to "our world." On the other hand, the people cannot return to the happy simplicity of early society. They must therefore continue the wholly unnatural life that is characterized by the co-operation of coercive society and religion. The good life, the life according to nature, is the retired life of the philosopher who lives at the fringes of civil society. The life devoted to civil society and to the service of others is not the life according to nature.⁴⁵

45. In reading Lucretius' poem, one must constantly keep in mind the fact that what strikes the reader first, and what is meant to strike the reader first, is "the sweet" (or what is comforting to unphilosophic man) and not "the bitter" or "the sad." The poem's opening with the praise of Venus and its ending with the somber description of the plague are only the most obvious and by no means the most important examples of the principle stated in i. 935 ff. and iv. 10 ff. For the understanding of the section dealing with human society (v. 925–1456), one has to consider, in addition, the plan of this

We must make a distinction between philosophic conventionalism and vulgar conventionalism. Vulgar conventionalism is presented most clearly in "the unjust speech" which Plato intrusted to Thrasymachus and to Glaucon and Adeimantus. According to it, the greatest good, or the most pleasant thing, is to have more than the others or to rule others. But the city and right necessarily impose some restraint on the desire for the greatest pleasure; they are incompatible with the greatest pleasure or with what is the greatest good by nature; they are against nature; they originate in convention. Hobbes would say that the city and right originate in the desire for life and that the desire for life is at least as natural as the desire for ruling others. To this objection the representative of vulgar conventionalism would reply that mere life is misery and that a miserable life is not a life which our nature seeks. The city and right are against nature because they sacrifice the greater good to the lesser good. It is true that the desire for superiority to others can come into its own only within the city. But this merely means that the life according to nature consists in cleverly exploiting the opportunities created by convention or in taking advantage of the good-natured trust which the many put in convention. Such exploitation requires that one be not hampered by sincere respect for city and right. The life according to nature requires such perfect inner freedom from the power of convention as is combined with the appearance of conventional behavior. The appearance of justice combined with actual injustice will lead one to the summit of happiness. One must indeed be clever to hide one's in-

particular section: (a) prepolitical life (925-1027), (b) the inventions belonging to prepolitical life (1028-1104), (c) political society (1105-60), (d) the inventions belonging to political society (1161-1456). Cf. the reference to fire in 1011 with 1091 ff., and the references to *facies viresque* as well as to gold in 1111-13 with 1170-71 and 1241 ff. Cf. from this point of view 977-81 with 1211 ff.; cf. also 1156 with 1161 and 1222-25 (see ii. 620-23, and Cicero *De finibus* i. 51). See also i. 72-74, 943-45; iii. 16-17, 59-86; v. 91-109, 114-21, 1392-1435; vi. 1-6, 596-607.

justice successfully while practicing it on a large scale; but this merely means that the life according to nature is the preserve of a small minority, of the natural elite, of those who are truly men and not born to be slaves. To be more precise, the summit of happiness is the life of the tyrant, of the man who has successfully committed the greatest crime by subordinating the city as a whole to his private good and who can afford to drop the appearance of justice or legality.⁴⁶

Vulgar conventionalism is the vulgarized version of philosophic conventionalism. Philosophic and vulgar conventionalism agree as to this: that by nature everyone seeks only his own good or that it is according to nature that one does not pay any regard to other people's good or that the regard for others arises only out of convention. Yet philosophic conventionalism denies that to pay no regard to others means to desire to have more than others or to be superior to others. Philosophic conventionalism is so far from regarding the desire for superiority as natural that it regards it as vain or opinion-bred. Philosophers, who as such have tasted more solid pleasures than those deriving from wealth, power, and the like, could not possibly identify the life according to nature with the life of the tyrant. Vulgar conventionalism owes its origin to a corruption of philosophic conventionalism. It makes sense to trace that corruption to "the sophists." The sophists may be said to have "published" and therewith debased the conventionalist teaching of pre-Socratic philosophers.

"Sophist" is a term which has many meanings. Among other things it may mean a philosopher, or a philosopher who holds unpopular views, or a man who shows his lack of good taste by teaching noble subjects for pay. At least since Plato, "sophist" is normally used in contradistinction to "philosopher" and therewith in a derogatory sense. "The Sophists" in

46. Plato *Republic* 344^{a-c}, 348^d, 358^{e3}-362^e, 364^{a1}-4, 365^{c6}-^{d2}; *Laws* 890^{a7}-9.

the historical sense are certain fifth-century Greeks who are presented by Plato and other philosophers as sophists in the precise sense, i.e., as nonphilosophers of a certain type. The sophist in the precise sense is a teacher of sham wisdom. Sham wisdom is not identical with untrue doctrine. Otherwise Plato would have been a sophist in the eyes of Aristotle, and vice versa. An erring philosopher is something entirely different from a sophist. Nothing prevents a sophist from occasionally and perhaps habitually teaching the truth. What is characteristic of the sophist is unconcern with the truth, i.e., with the truth about the whole. The sophist, in contradistinction to the philosopher, is not set in motion and kept in motion by the sting of the awareness of the fundamental difference between conviction or belief and genuine insight. But this is clearly too general, for unconcern with the truth about the whole is not a preserve of the sophist. The sophist is a man who is unconcerned with the truth, or does not love wisdom, although he knows better than most other men that wisdom or science is the highest excellence of man. Being aware of the unique character of wisdom, he knows that the honor deriving from wisdom is the highest honor. He is concerned with wisdom, not for its own sake, not because he hates the lie in the soul more than anything else, but for the sake of the honor or the prestige that attends wisdom. He lives or acts on the principle that prestige or superiority to others or having more than others is the highest good. He acts on the principle of vulgar conventionalism. Since he accepts the teaching of philosophic conventionalism and thus is more articulate than the many who act on the same principle on which he acts, he can be regarded as the most fitting representative of vulgar conventionalism. There arises, however, this difficulty. The sophist's highest good is the prestige deriving from wisdom. To achieve his highest good, he must display his wisdom. Displaying his wisdom means teaching the view that the life according to nature or the life of the wise man consists in combining actual

injustice with the appearance of justice. Yet admitting that one is, in fact, unjust is incompatible with successfully preserving the appearance of justice. It is incompatible with wisdom, and it therefore makes impossible the honor deriving from wisdom. Sooner or later the sophist is therefore forced to conceal his wisdom or to bow to views which he regards as merely conventional. He must become resigned to deriving his prestige from propagating more or less respectable views. It is for this reason that one cannot speak of *the* teaching, i.e., of the explicit teaching, of the sophists.

As regards the most famous sophist, Protagoras, Plato imputes to him a myth which adumbrates the conventionalist thesis. The myth of the *Protagoras* is based on the distinction between nature, art, and convention. Nature is represented by the subterraneous work of certain gods and by the work of Epimetheus. Epimetheus, the being in whom thought follows production, represents nature in the sense of materialism, according to which thought comes later than thoughtless bodies and their thoughtless motions. The subterraneous work of the gods is work without light, without understanding, and has therefore fundamentally the same meaning as the work of Epimetheus. Art is represented by Prometheus, by Prometheus' theft, by his rebellion against the will of the gods above. Convention is represented by Zeus's gift of justice to "all": that "gift" becomes effective only through the punitive activity of civil society, and its requirements are perfectly fulfilled by the mere semblance of justice.⁴⁷

47. *Protagoras* 322^b6-8, 323^b2-c2, 324^a3-c5, 325^a6-d7, 327^d1-2. There seems to be a contradiction between the myth of the *Protagoras* and the *Theaetetus*, where the conventionalist thesis is presented as an improved version of Protagoras' thesis, which in its denials of ordinarily held views goes much beyond conventionalism (167^c2-7, 172^a1-b6, 177^c6-d6). But, as the context shows, what Protagoras says in the myth of the *Protagoras* is likewise an improved version of his real thesis. In the *Protagoras* the improvement is effected under the pressure of the situation (the presence of a prospective pupil) by Protagoras himself, whereas in the *Theaetetus* it is effected on his behalf by Socrates.

I conclude this chapter with a brief remark about pre-Socratic natural right. I shall not speak of those types of natural right doctrine which were fully developed by Socrates and his followers. I shall limit myself to a sketch of that type which was rejected by the classics: egalitarian natural right.

The doubt of the natural character of both slavery and the division of the human race into distinct political or ethnic groups finds its most simple expression in the thesis that all men are by nature free and equal. Natural freedom and natural equality are inseparable from each other. If all men are by nature free, no one is by nature the superior of any other, and hence by nature all men are equal to each other. If all men are by nature free and equal, it is against nature to treat any man as unfree or unequal; the preservation or restoration of natural freedom or equality is required by natural right. Thus the city appears to be against natural right, for the city stands or falls by inequality or subordination and by the restriction of freedom. The effective denial of natural freedom and equality by the city must be traced to violence and ultimately to wrong opinion or the corruption of nature. This means that natural freedom and equality will be thought to have been fully effective at the beginning, when nature was not yet corrupted by opinion. The doctrine of natural freedom and equality thus allies itself with the doctrine of a golden age. Yet one may assume that original innocence is not irretrievably lost and that, in spite of the natural character of freedom and equality, civil society is indispensable. In that case one must look for a way in which civil society can be brought into some degree of harmony with natural freedom and equality. The only way in which this can be done is to assume that civil society, to the extent to which it is in agreement with natural right, is based on the consent or, more precisely, on the contract of the free and equal individuals.

It is doubtful whether the doctrines of natural freedom and equality, as well as of the social compact, were originally meant as political theses and not rather as theoretical theses setting forth the questionable character of civil society as such. As long as nature was regarded as the standard, the contractualist doctrine, regardless of whether it was based on the egalitarian or the nonegalitarian premise, necessarily implied a depreciation of civil society, because it implied that civil society is not natural but conventional.⁴⁸ This must be borne in mind if one wants to understand the specific character and the tremendous political effect of the contractualist doctrines of the seventeenth and eighteenth centuries. For in the modern era the notion that nature is the standard was abandoned, and therewith the stigma on whatever is conventional or contractual was taken away. As for premodern times, it is safe to assume that all contractualist doctrines implied the depreciation of whatever owed its origin to contract.

In a passage of Plato's *Crito*, Socrates is presented as deriving his duty of obedience to the city of Athens and her laws from a tacit contract. To understand this passage, one has to compare it with its parallel in the *Republic*. In the *Republic* the philosopher's duty of obedience to the city is not derived from any contract. The reason is obvious. The city of the *Republic* is the best city, the city according to nature. But the city of Athens, that democracy, was from Plato's point of view a most imperfect city.⁴⁹ Only the allegiance to an inferior community can be derivative from contract, for an honest man keeps his promises to everyone regardless of the worth of him to whom he made the promise.

48. Aristotle *Politics* 1280^b10-13; Xenophon *Memorabilia* iv. 4. 13-14 (Cf. *Resp. Laced.* 8. 5).

49. *Crito* 50^c4-52^e5 (cf. 52^e5-6); *Republic* 519^e8-520^e1.